NO. 09-72603

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANCISCO JAVIER GARFIAS RODRIGUEZ
CASE NO. A 079 766 006

Petitioner,

v.

ERIC H. HOLDER, JR.,
Attorney General

Respondent.

PETITION FOR REVIEW OF BOARD OF IMMIGRATION APPEALS FINAL ORDER

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

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I. INTRODUCTION

Pursuant to Federal Rules of Appellate Procedure 35(b) and 40(a), Petitioner Francisco Garfias Rodriguez seeks a panel rehearing with suggestion for rehearing *en banc* of the Court's opinion. *Garfias-Rodriguez v. Holder*, --F.3d-- (9th Cir. April 11, 2011).

Petitioner respectfully asserts that the Panel's holding conflicts with controlling precedent of this Court with regards to the determination of whether a new agency rule clarifying an uncertain area of law may be applied retroactively. This Court has long recognized that an agency "may act through adjudication to clarify an uncertain area of the law, so long as the retroactive impact of the clarification is not excessive or unwarranted." *Montgomery Ward & Co., Inc. v. FTC*, 691 F.2d 1322, 1328 (9th Cir. 1982). However, following the recent opinion in *Morales-Izquierdo v. Department of Homeland Security*, 600 F.3d 1076 (9th Cir. 2010), the Panel concluded that adopting a *subsequent*, contrary agency interpretation should not constitute clarification of "an uncertain area of the law" as defined under *Montgomery Ward.* This interpretation constitutes a departure from the Court's case law dating at least back to its decision in *Montgomery Ward*. As such, en banc review is necessary to secure and maintain uniformity of the Court's decisions.

In addition, this case involves a question of exceptional importance: in light of the Supreme Court's decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), this Court is now repeatedly addressing decisions where the agency asserts the authority to disregard prior interpretations of this Court with respect to ambiguous statutes. Given the emergence of this issue, it is incumbent on the Court to clarify when persons may rely on an Article III Court's interpretation of ambiguous statutes.[1]

II. REASONS FOR GRANTING REHEARING

Mr. Garfias entered the United States in 1996 without inspection. Since then he has returned twice to his native Mexico, the first time to visit his ailing mother and the second time to attend her funeral. He is married to a U.S. citizen and has two children, both U.S. citizens. Based upon the approved visa petition filed by his wife, Petitioner sought to apply for adjustment of status under 8 U.S.C. § 1255(i), a temporary provision allowing for even those persons who had unlawfully entered the country or had violated their immigration status in another

[1] In his dissent in *Brand X*, Judge Scalia predicted that the decision would create a "wonderful new world" for law professors and litigators grappling to apply the decision. *Brand X*, 545 U.S. at 2721 (Scalia, J., dissenting). He also notes that the decision raises a separation of powers problem in that it allows the Executive to reverse or ignore Article III courts. *Id*. The instant case presents an opportunity for this Court to resolve one of the many scenarios Judge Scalia predicts are sure to arise as a result of the *Brand X* decision.

manner, to pay a penalty fee in exchange for the right to be adjusted to lawful permanent resident status. This limited relief expired and only those who are the beneficiaries of petitions filed on or before April 30, 2001, continue to enjoy this privilege. 8 U.S.C. § 1255(i)(1). Yet the agency has sought to largely eliminate this relief even for this limited class of individuals by declaring that those persons whose unlawful entry renders them inadmissible under 8 U.S.C. § 1182(a)(9)(C)(i)(I) are ineligible to seek adjustment of status. *Matter of Briones*, 24 I. & N. Dec. 355 (BIA 2007).

The agency interpretation is contrary to this Court's prior interpretation in *Acosta v. Gonzales,* 439 F.3d 550 (9th Cir. 2006). However, the agency did not announce what the law would be for those persons under this Court's jurisdiction. Instead, it explicitly declined to decide "whether to apply our holding in the Ninth and Tenth Circuits." *Briones*, I. & N. Dec. at 372, n.9. Nonetheless, in the instant case the agency ruled that it was no longer bound by this Court's interpretation in *Acosta*, and instead applied the agency's interpretation from *Briones*.[2] On petition for review, the Panel's decision determined that pursuant to *Brand X*, it was bound to defer to any reasonable interpretation of the agency, as the issue presented was based on an ambiguous statute.

[2] Subsequent to this case, and three years after its decision *Briones*, the BIA issued *Matter of Diaz and Lopez*, 25 I. & N. Dec. 188 (BIA 2010), in which the agency clarified they would apply their interpretation from *Briones* even to cases in the Ninth Circuit.

Petitioner respectfully asserts that the agency interpretation is not reasonable. *See* section II.D. As such, this Court should not defer to the interpretation. C*hevron U.S.A., Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837, 843 (1984). However, even if the Court maintains that the agency's interpretation is reasonable, pursuant to its own longstanding case law, before applying this rule to Petitioner it should first determine whether the "retroactive impact of the clarification is not excessive or unwarranted." *Montgomery Ward*, 691 F.2d at 1328.

A) The Panel's Decision Fails to Apply a Retroactivity Analysis.

By failing to correctly acknowledge the phenomenon at issue, namely, the prerogative of the agency to create a new rule by interpreting an ambiguous statute contrary to a prior interpretation from the circuit court, the Panel's decision shields the agency action from the proper review -- ascertaining whether the new rule is unduly oppressive if applied retroactively. This Court has recognized that "when a court overrules its own prior interpretation of an ambiguous statute in deference to an interpretation by an agency—an agency that lacks the constitutional authority to overrule the court's prior interpretation—the fiction that the statute has always meant one particular thing may appear to break down." *Morales-Izquierdo*, 600 F.3d at 1087-92. Yet, following *Morales-Izquierdo*, the Panel insists on treating

the adoption of the agency interpretation as if this Court was simply clarifying what the law always has been. Petitioner seeks redress for this error.

The retroactivity issue presented in this case follows from the Supreme Court's decision *Brand X* and this Court's application of *Brand X* rule in *Morales-Izquierdo*. Until *Morales-Izquierdo****Error! Bookmark not defined.***, no court had addressed whether an agency's newly announced rule that conflicts with prior circuit precedent should be applied retroactively to individuals who relied on the prior circuit precedent. Nonetheless, case law from this Court established a five-part test to determine whether an adjudicative action taken by the agency to clarify an uncertain area of the law should be applied retroactively. *See Montgomery Ward,* 691 F.2d at 1322. Instead of applying this analysis, the Panel relied on principles from cases where the *courts* announce new *judicial* interpretations of *unambiguous* statutes, and thus were articulating the law as Congress had always intended.

In *Morales-Izquierdo* the Court acknowledged that the *Brand X* case does not present a situation where a court is "correcting an 'erroneous' interpretation of a statute and reaffirming what the statute has always meant." *See Morales-Izquierdo*, 600 F.3d at 1088-89. As *Brand X****Error! Bookmark not defined.*** explains, "[T]he agency's decision to construe the statute differently from a court does not say that the court's holding was legally wrong. Instead, the agency may,

consistent with the court's holding, choose a different construction . . . ." *Brand X*, 545 U.S. at 983 (cited in *Morales-Izquierdo*, 600 F.3d at 1089). But in contradiction to this statement the Panel, following *Morales-Izquierdo*, concluded that by rejecting this Court's prior interpretation, and deferring to the subsequent, contrary interpretation promulgated by the agency, "we are not creating a new rule of law, but rather we are correcting our prior reading of the statutes." *Garfias*, slip op. at 4797.

The Panel then applied an ill-fitting standard taken from civil cases involving retroactive application of judicial decisions interpreting unambiguous statutes or constitutional principles. *Harper v. Va. Dep't of Taxation*, 509 U.S. 86 (1993), and *Rivers v. Roadway Express*, 511 U.S. 298 (1994).[3] Neither *Harper* nor *Rivers* addresses a situation such as this, where a federal court has found a statute to be ambiguous and then deferred to an agency's contrary interpretation, and, in so doing, overturned its prior precedent decision. Neither of those cases are controlling as they do not involve situations where a Court is changing a prior interpretation of an ambiguous statute, one that was not legally wrong. Rather, *Harper* involved a situation where the court found that prior published decisions had erroneously interpreted a statute as consistent with the Constitution, when in

[3] *Harper* and *Rivers* stand for the proposition that judicial interpretations apply retroactively to cases open on direct review. *Harper*, 509 U.S. at 97; *Rivers*, 511 U.S. at 311-12.

fact the statute was unconstitutional. *See* 509 U.S. at 90-92. Like *Harper*, *Rivers* also did not involve judicial deference to an agency decision. Instead, the Supreme Court recognized that given the hierarchical structure of our judicial system, appellate decisions interpreting statutes do not change the law, but rather state what the law has always been. *See Rivers*, 511 U.S. at 313 n.12.

Nonetheless, in *Morales-Izquierdo* the Court found that *Harper* and *Rivers* are applicable because "statutory ambiguity alone has never been sufficient to render judicial interpretation of a statute non-retroactive" and notes that this proposition is supported by the Court's many decisions deferring to an agency's interpretation of an ambiguous statute. 600 F.3d at 1089 & n.13. This misses the point. The issue presented is not one of "statutory ambiguity alone," but rather, an issue of statutory ambiguity compounded by the Court's prior *contrary* resolution of that ambiguity, which is subsequently rejected by the agency's interpretation. The fact that a court has now deferred to an agency rule does not speak to the distinct issue presented in this case – what happens when the agency whose rule the court adopts changes the prior rule? Not only does it change the prior rule of this Court, but also the prior agency practice, as both this Court and the agency have made clear that the agency is bound to follow the rules of the Circuit Court in

which the applicant resides.[4] Thus, the agency practice up until sometime after *Briones* was to apply this Court's holding in *Acosta,* as *evidenced* by the initial BIA remand in the instant case.

In following *Morales-Izquierdo*, the Panel ignores the fundamental premise of *Brand X*, that it is the agency's interpretation of an ambiguous statute – not a judicial interpretation – that governs. As the Supreme Court explained, "*Chevron*'s premise is that it is for agencies, not courts, to fill statutory gap" and thus, an agency has authority to "choose a different construction [of a statute], since the agency remains the authoritative interpreter (within the limits of reason) of such statutes." *Brand X*, 545 U.S. at 982, 983. Accordingly, the Panel errs in treating this case as one governed by *Harper* and *Rivers.*

B) The Panel's Decision Deviates from Retroactivity Principles Previously Established by this Court and the Supreme Court.

The Panel acknowledges that an agency "may act through adjudication to clarify an uncertain area of the law, so long as the retroactive impact of the clarification is not excessive or unwarranted." *Montgomery Ward*, 691 F.2d at

[4] *See Matter of K-S-*, 20 I. & N. Dec. 715 (BIA 1993) (requiring the Board to follow circuit precedent in cases arising in that judicial circuit); *Matter of Anselmo*, 20 I. & N. Dec. 25 (BIA 1989) (same).

1328.[5] This is precisely what has occurred. First, in *Briones*, the agency clarified its alternative, contrary interpretation of an ambiguous statute, although it explicitly declined to decide what interpretation should be applied in the Ninth Circuit. *Briones*, 24 I. & N. Dec. at 372, n.9. It was not until three years later, in *Matter of Diaz and Lopez*, that the agency proclaimed the right to apply their new interpretation in the Ninth Circuit. 25 I. & N. Dec. 188. Indeed, this action was taken even prior to the Panel's decision in *Garfias*, further demonstrating that it was an agency adjudicative action establishing the rule in an uncertain area of the law.

The Panel fails to explain why a court's deference to an agency decision to change a rule under *Brand X* warrants a different retroactivity analysis than what the Court applies when it is reviewing a new agency rule for the first time. Under the law of this circuit for nearly thirty years, if the agency is adopting a new rule or clarifying an uncertain area of the law, this Court must apply a five-step analysis to determine whether it would be impermissible to retroactively apply the agency's new rule. *Montgomery Ward,* 691 F.2d at 1322; *Miguel-Miguel v. Gonzales*, 500

[5] In *Montgomery Ward*, this Court adopted the test developed by the D.C. Circuit in *Retail, Wholesale and Department Store Union v. NLRB*, 466 F.2d 380, 390-93 (D.C. Cir. 1972), for determining whether a new agency rule shall apply retrospectively. Other circuits have applied the same test. *Montgomery Ward*, 691 F.2d at 1333 n.20.

F.3d 941 (9th Cir. 2007) (reviewing the agency's new rule, deferring to it under *Chevron*, and applying the *Montgomery Ward* analysis).

Montgomery Ward addresses the concerns expressed by the Supreme Court in *SEC v. Chenery Corp*, with regards to the retroactive application of new agency rules. 332 U.S. 194, 203 (1947). The Supreme Court later clarified that courts must determine whether it would be manifestly unjust to apply a new agency rule created through an adjudicatory decision retrospectively to persons who relied on the old rule. *Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 60 n.12 (1984) (recognizing the principle that "an administrative agency may not apply a new rule retroactively when to do so would unduly intrude upon reasonable reliance interests").

In *Chang v. United States*, 327 F.3d 911, 928 (9th Cir. 2003), this Court applied the *Montgomery Ward* factors to find that the application of the new agency decision at play was impermissibly retroactive. 327 F.3d at 929. Similarly, in *Miguel-Miguel*, this Court applied the *Montgomery Ward* factors to determine if a new adjudicatory rule should be applied to convictions entered prior to the Attorney General's decision. 500 F.3d at 951.

The concerns expressed by the Supreme Court and this Court in *Montgomery Ward* cannot be reconciled with the Panel's approach in this case or the decision in *Morales-Izquierdo*. According to the Panel, the *Montgomery Ward*

analysis does not apply if the Court announces that it is now deferring to a new agency interpretation pursuant to *Brand X* despite the fact that the concerns raised in *Chenery* and *Heckler* apply equally to both situations. The additional justifications proffered in *Morales-Izquierdo* for applying the Court's adoption of the agency's subsequent interpretation retroactively would apply equally to *any* agency decision declaring a change in rule. [6]

Failure to apply the *Montgomery Ward* analysis in the instant case creates an arbitrary result where this Court only reviews a decision for an impermissible, retroactive impact if this Court has not already provided a contrary interpretation of an ambiguous statute. This is especially incongruous given that there are even greater concerns of reliance where an Article III court has issued a published decision governing the question at hand, as opposed to a new rule from the agency, often applied (as in this case) without a published rule or precedent decision.

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[6] Moreover, even if the Panel did not apply the *Montgomery Ward* test, it could have applied the basic tenets of retroactivity law as set forth by the Supreme Court and Ninth Circuit in other contexts, including the balancing test laid out in *Chenery*, examining whether the public benefit outweighs the individual harm. 332 U.S. at 203. *See, e.g., Landgraf v. USI Film Products*, 511 U.S. 244, 267-268 (1994) (when there is a new statute enacted by Congress, court must determine whether application of the new rule to past conduct would be impermissibly retroactive, in that it would "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed"); *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971); *George v. Camacho*, 119 F.3d 1393, 1401 (9th Cir. 1997) (*en banc*); *Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166, 1171 (9th Cir. 2003) (recognizing the inherent unfairness in applying new rule retroactively to the petitioner).

The instant case presents the same scenario: For nearly a decade, the Board did nothing to address the interpretative issues surrounding the intersection of 8 U.S.C. §§ 1255(i) and 1182(a)(9)(C)(i)(I). In its place, the Ninth Circuit provided clear guidance. However, now the agency has changed the rules midstream, rendering Petitioner ineligible for residency, forcing him to face indefinite separation from his U.S. citizen wife and children.

C) *Montgomery Ward* Factors Counsel Against Retroactive Application.

If the Panel had applied the *Montgomery Ward* analysis to the instant case, it would have concluded that the change in the agency's position could not apply retroactively. The first factor is whether the administrative case was one of first impression. This factor "is directed towards maintaining an incentive for litigants to raise novel claims by allowing a litigant who successfully argues for a new rule to get the benefit of that rule." *Miguel-Miguel*, 500 F.3d at 951. In the instant case, the issue addressed by the agency was not an issue of first impression; this Court had previously addressed the issue in *Acosta*. Furthermore, like *Miguel-Miguel*, the agency's subsequent published decision in *Matter of Briones* was in an unrelated proceeding. In *Briones*, the Court explicitly declined to determine whether this new rule would be applied to persons like Petitioner in the Ninth Circuit who had filed their applications in reliance on *Acosta*. *Briones*, 24 I. & N. Dec. at 372, n.9.

The second factor is whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law. Here, the agency's rule unquestionably represents a departure from the holding and rule established by this Court in *Acosta*, as the two reach contrary results. The agency was previously required to follow *Acosta* in cases arising in the Ninth Circuit and in fact did so the first time the case was appealed to the BIA.

The third factor is the extent to which the party against whom the new rule is applied relied on the former rule. Petitioner affirmatively applied for adjustment, not only submitting the standard filing fees and fees to his attorney, but in addition submitting a $1000 penalty fee, as well as hefty attorney fees, all in reliance on the opportunity that was previously available under 8 U.S.C. § 1255(i). He renewed these applications before the IJ, and as noted, the BIA remanded his first appeal explicitly based on the agency's finding that *Acosta* provided him with an opportunity to seek adjustment.

The fourth factor is the degree of burden that a retroactive order imposes on a party. Here, the retroactive application imposes an immense burden on Petitioner (and hundreds of others who are part of this limited class of individuals--beneficiaries of visa petitions filed on or before April 30, 2001, pursuant to § 1255(i)). If the new rule is applied retroactively, he will not only have lost

thousands of dollars, but will be subject to removal and indefinite separation from his wife and children.

The fifth factor is the statutory interest in applying a new rule despite the reliance of a party on the old standard. The Panel found that in *Acosta* this Court held that Congressional intent was ambiguous. Because Congress was ambiguous regarding its intent, there is no clear statutory interest in denying Petitioner's opportunity to apply for permanent residency.

D) The Agency's Interpretation is Unreasonable.

Finally, Petitioner respectfully submits the Panel erred in concluding that the agency interpretation of the statute was reasonable. The agency interpretation fails to give effect to 8 U.S.C. § 1255 and is based on several clearly erroneous findings with regards to that statute. Accordingly, its interpretation should be rejected.

In general, persons who have unlawfully entered the United States are ineligible for adjustment of status to lawful permanent residency because they have not been "inspected and admitted or paroled" for purposes of 8 U.S.C. § 1255(a). However, Congress created exceptions. One limited exception, § 1255(i), allows for persons who are the beneficiaries of visa petitions filed on or before April 30, 2001 to file for adjustment of status notwithstanding their unlawful entry, provided they pay an additional penalty fee of $1,000.00. Thus, § 1255(i) affords an "exception" to the "general rule" that "aliens who entered the country without

inspection are ineligible to seek adjustment to lawful permanent status." *Chan v. Reno*, 113 F.3d 1068, 1071 (9th Cir. 1997). On the other hand, the new permanent provision at 8 U.S.C. § 1182(a)(9)(C)(i)(I) declares persons inadmissible who have entered without inspection if they have previously resided in the United States for a year or more without lawful status. The Panel's decision acknowledges "that §§ 1182(a)(9)(C)(i)(I) and 1255(i) contain two competing mandates." *Garfias*, slip op. at 4794. The Panel found that it must defer to Board's new interpretation in *Briones* because it was reasonable. However, the agency interpretation is based on several errors demonstrating a fundamental misreading of the adjustment statute.

First, and most importantly, the Panel erred in relying on what "the BIA deemed … 'of crucial importance' to its interpretation that 'in every other case where Congress has extended eligibility for adjustment of status to inadmissible aliens … it has done so unambiguously, either by negating certain grounds of inadmissibility outright or by providing for discretionary waivers of inadmissibility, or both.'" *Garfias*, slip op. at 4795-96. This finding, deemed "of crucial importance", is in error. The most recent example to the contrary is the enactment of 8 U.S.C. § 1255(m)(1) & (2), providing adjustment of status for recipients of U visas (for victims of certain crimes) and their derivative family members, without regard to the specific grounds of inadmissibility, *and* without explicit reference to the need for a waiver or exception (other than the national

security grounds at § 1182(a)(3)(E)). Similarly, § 1255(j)(1) & (2) allows for the adjustment of recipients of various classes of visa again without regards to the grounds of inadmissibility, *and* without any reference to the need for a waiver or exception (other than the national security grounds at § 1182(a)(3)(E)). Thus, the Board made a fundamental error in finding that the adjustment scheme established by Congress in 8 U.S.C. § 1255 does not allow for adjustment without explicit reference to otherwise applicable grounds of inadmissibility.

Second, the Panel cited to the BIA's holding that the alternative interpretation previously accepted in *Acosta* has the effect of "making … adjustment available to a whole new class of aliens who had *never* been eligible for it." *Garfias*, slip op. at 4795, *citing Briones*, 24 I. & N. Dec. at 365-67. This is a clear error. The Board cites to old § 1182(a)(6)(B), but that provision is completely inapposite as it only deals with applicants who have been ordered deported or excluded. There was no bar for individuals who had reentered the country without inspection after previous unlawful status in the country if, like Petitioner, they had not left pursuant to an order.

Third, in attempting to avoid the inevitable conflict between §§ 1182(a)(9)(C)(i)(I) and 1255(i), the agency admits that its interpretation is not even consistent with its understanding of how § 1255(i) allows an applicant who has unlawfully entered the country to overcome a parallel ground of inadmissibility at

§ 1182(a)(6)(A)(i). Indeed, if the Board did not create this arbitrary distinction, § 1255(i)(1)(A) would now be rendered superfluous as no person would be eligible to adjust under § 1255 who had unlawfully entered the country. Yet this clearly violates the plain language of the statute.

Here, the statutes can easily be harmonized so as to give meaning to every term without creating an irrational or self-defeating mandate. The sensible, harmonious reading of the provisions is that while an applicant who has unlawfully reentered the United States would otherwise be inadmissible under the permanent provision now at § 1182(a)(9)(C)(i)(I), for the limited class of individuals who are the beneficiaries of visa petitions filed on or before April 30, 2001, § 1255(i) allows for penalty-fee adjustment "notwithstanding" an applicant's unlawful presence and unlawful entries into the United States. A reasonable interpretation of the statutes at issue avoids the need for this Court to address the necessary questions on retroactivity that must otherwise follow.

III. CONCLUSION

Petitioner respectfully requests that the petition for rehearing be granted in recognition that the Panel's holding cannot be reconciled with controlling case law.

Date: June 27, 2011

Respectfully submitted,

s/ Matt Adams

Matt Adams
Northwest Immigrant Rights Project

Attorney for Petitioner

CERTIFICATE OF COMPLIANCE TO FED. R. APP. 32(A)(7)(C) AND CIRCUIT RULE 40-1(A), CASE NUMBER 09-72603

I certify that:

✓ 1. Pursuant to Fed. R. App. P. 40-1(a), the attached petition for rehearing brief is

Proportionately spaced, has a typeface of 14 points or more and contains **4,102** words (must not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text).

June 27, 2011
Date

s/ Matt Adams
Matt Adams
Northwest Immigrant Rights Project

CERTIFICATE OF SERVICE

RE: Garfias-Rodriguez v. Holder, Case No. 09-72603

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 27, 2011.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed in Seattle, Washington, on June 27, 2011.

s/ Matt Adams
Matt Adams
Northwest Immigrant Rights Project

ADDENDUM

Garfias-Rodriguez v. Holder, Opinion, April 11, 2011.

No. 09-72603

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANCISCO JAVIER GARFIAS-RODRIGUEZ,
A076-766-006,

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v.

ERIC H. HOLDER, JR., Attorney General,

Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF
THE BOARD OF IMMIGRATION APPEALS

RESPONDENT'S OPPOSITION TO THE PETITION FOR REHEARING AND REHEARING *EN BANC*

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INTRODUCTION

Respondent hereby opposes Francisco Javier Garfias-Rodriguez's ("Mr. Garfias") Petition for Rehearing and Rehearing En Banc ("Reh. Pet.").[1/] Mr. Garfias *does not satisfy the requirements* for rehearing set forth in Rules 35 and 40 Fed. R. App. P. The Court's retroactive approval of the Board of Immigration Appeals's ("BIA") reasonable and binding clarification in *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007), that aliens may not adjust their status under 8 U.S.C. § 1255(i) if they are recidivist immigration violators inadmissible under § 1182(a)(9)(C)(i)(I), and its correction of the Court's prior contrary reading of these statutes in *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006), did not overlook or misapprehend any point of law or fact. *See* Fed. R. App. P. 40(a)(2). Rehearing *en banc* is not warranted because the Court's decision does not conflict with any of this Court's precedents or those of the Supreme Court and Mr. Garfias has failed to establish that he raises a question of exceptional importance. *See* Fed. R. App. P. 35(b)(1).

BACKGROUND

Mr. Garfias, a native and citizen of Mexico, unlawfully entered the United States in 1996 and departed the country, once in 1999 and once in 2001, each time

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[1/] In this pleading, Respondent responds solely to the rehearing petition that Mr. Garfias filed through his retained counsel. If the Court determines that it needs a response to the tendered amicus brief, Respondent respectfully requests an opportunity to provide a complete response.

reentering without inspection. Certified Administrative Record ("A.R.") 78-80, 366, 370-71, 378-79. Mr. Garfias's United States-citizen wife filed a visa petition to classify him as an immediate relative under 8 U.S.C. § 1151(b). A.R. 370, 374. With that visa petition, Mr. Garfias filed an application for adjustment of status pursuant to § 1255(i), on August 26, 2002. A.R. 370-76. Subsequently, U.S. Immigration and Customs Enforcement ("ICE") instituted removal proceedings against Mr. Garfias. A.R. 395-96. ICE charged Mr. Garfias with removability under § 1182(a)(6)(A)(i), (9)(C)(i)(I). *Id.*

At a hearing before an Immigration Judge, Mr. Garfias, through counsel, admitted the allegations and conceded removability as charged, but argued that he still was eligible to adjust his status under § 1255(i). A.R. 62-63, 68-70. The Immigration Judge denied Mr. Garfias's application for status adjustment because Mr. Garfias was inadmissible as a recidivist immigration violator pursuant to § 1182(a)(9)(C)(i)(I). A.R. 295-301. Mr. Garfias appealed the Immigration Judge's decision to the BIA. A.R. 271-76, 287-88. The BIA sustained his appeal and remanded the case to the Immigration Judge for reconsideration in light of *Acosta*, 439 F.3d at 550, and *Perez–Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004).[2/]

[2/] In *Acosta*, 439 F.3d at 556, the Court extended *Perez–Gonzalez*'s reasoning and held that recidivist immigration violators, like Mr. Garfias, who were inadmissible under § 1182(a)(9)(C)(i)(I) — the provision at issue in this case — remained eligible

A.R. 268-69. On remand, the Immigration Judge acknowledged *Perez–Gonzalez* and *Acosta*, but denied Mr. Garfias's application on other grounds. A.R. 28-34.

Mr. Garfias again appealed the Immigration Judge's decision to the BIA. A.R. 19-23, 42-44. On July 30, 2009, the BIA dismissed Mr. Garfias's appeal. A.R. 3-5. The BIA stated that, after the Judge's 2007 post-remand decision, the BIA had issued a precedential decision in *Briones*, 24 I&N Dec. at 366-67, 371, where it held that a recidivist immigration violator who is inadmissible under § 1182(a)(9)(C)(i)(I) cannot adjust status under § 1255(i). A.R. 4. The BIA found that *Acosta* no longer appeared to be good law because the *Acosta* court noted that it was constrained by *Perez-Gonzalez*, which had been overruled by *Duran Gonzales v. Dep't of Homeland Security*, 508 F.3d 1227 (9th Cir. 2007). *Id.* In light of *Duran Gonzales*, the BIA found that *Briones*, and not *Acosta*, controlled Mr. Garfias's case, and concluded that Mr. Garfias was barred from adjusting his status under § 1255(i). A.R. 4.

Mr. Garfias filed a timely petition for review, which this Court denied in a published decision. *Garfias-Rodriguez v. Holder*, ___ F.3d ___, 2011 WL 1346960, *6-7 (9th Cir. April 11, 2011). Following the Supreme Court's directive in *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967 (2005), and

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for adjustment under § 1255(i).

Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984), the Court approved the BIA's reasonable and binding clarification in *Briones* — that aliens may not adjust their status under § 1255(i) if they are recidivist immigration violators inadmissible under § 1182(a)(9)(C)(i)(I). *Garfias-Rodriguez*, 2011 WL 1346960, at *5-6. Following this Court's directive in *Morales–Izquierdo v. Dep't of Homeland Security*, 600 F.3d 1076, 1087-92 (9th Cir. 2010), the Court further ruled that *Briones* may be applied retroactively. *Garfias–Rodriguez*, 2011 WL 1346960, at *6–7. This rehearing petition followed.[3/]

ARGUMENT

I. The Court Did Not Misapprehend or Overlook Any Point of Law or Fact in Approving the BIA's Reasonable and Binding Clarification in *Briones*.

8 U.S.C. § 1255(i) permits the Attorney General to adjust the status of certain aliens who are unlawfully present in the United States. Section 1255(i)(2), however, limits the Attorney General's discretion, by providing that the Attorney General may adjust an alien's status only if, among other things, the alien "is admissible to the United States for permanent residence." *Id.* *Briones* held that an alien who is inadmissible as a recidivist immigration violator under § 1182(a)(9)(C)(i)(I) (as

[3/] Mr. Garfias does not seek rehearing of the Court's holding that 8 U.S.C. § 1229c(e) unambiguously provided the Attorney General with the authority to promulgate 8 C.F.R. § 1240.26(i), and that Mr. Garfias's grant of voluntary departure terminated upon his decision to file a petition for review.

opposed to an alien who is inadmissible for simply being present without admission under § 1182(a)(6)(A)(i)) is not eligible for adjustment of status under § 1255(i) because otherwise § 1255(i) would "be making . . . adjustment available to a whole new class of aliens who had never been eligible for it." *Briones*, 24 I&N Dec. at 365–67. "[S]uch an outcome," *Briones* concluded, "seems perfectly consonant with the language, structure and purpose of the [Immigration and Nationality Act ("INA")], taken as a whole." *Id.* at 371. Like every other Court to address the issue, this Court held that the BIA's *Briones* decision is reasonable and therefore entitled to deference under the second step of the *Chevron* analysis. *Padilla-Caldera v. Holder*, 637 F.3d 1140, 1150-52 (10th Cir. 2011); *Renteria–Ledesma v. Holder*, 615 F.3d 903, 908 (8th Cir. 2010); *Ramirez v. Holder*, 609 F.3d 331, 335–36 (4th Cir. 2010); *Mora v. Mukasey*, 550 F.3d 231, 238 (2d Cir. 2008); *Ramirez–Canales v. Mukasey*, 517 F.3d 904, 907–08 (6th Cir. 2008). Without addressing any of these decisions, Mr. Garfias's suggests that the Court "overlooked or misapprehended" three issues in approving the BIA's reasonable and binding clarification in *Briones*. Reh. Pet. at 15-17.

First, Mr. Garfias contends that *Briones* is inconsistent "with the BIA's understanding of how § 1255(i) allows an applicant who has unlawfully entered the country to overcome a parallel ground of inadmissibility at § 1182(a)(6)(A)(i)." Reh.

Pet. at 16-17. The claim is without merit. The BIA explained that this contradiction *did not exist* when § 1255(i) was first enacted in 1994, because at that time, an alien who entered the United States without inspection was deportable, but he was not inadmissible. *Briones*, 24 I&N Dec. at 362–63. Nevertheless, IIRIRA[4/] rendered aliens who enter without inspection inadmissible. *Briones*, 24 I&N Dec. at 363. Despite this change, the BIA reasonably concluded that "[§ 1255(i)] adjustment remains available to aliens inadmissible under [§ 1182(a)(6)(A)(i)] only because a contrary interpretation would render the language of [§ 1255(i)] so internally contradictory as to effectively vitiate the statute, an absurd result that Congress is presumed not to have intended." *Id.* Accordingly, the BIA's understanding of how § 1255(i) permits an alien to overcome § 1182(a)(6)(A)(i) is based on the statutory canon of avoiding an absurd result. That is, the BIA stated that if § 1255(i) were interpreted otherwise, it would be rendered superfluous and meaningless. *Id.* at 365. But the BIA aptly recognized that "the fact that [the] statute's plain language may lead to absurd results in some cases does not permit . . . disregard[ing] that language in other contexts where no such absurd consequence would follow." *Id.* In this regard, the BIA noted that § 1182(a)(9)(C)(i)(I)

[4/] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009, 3009–546 (eff. Apr. 1, 1997) ("IIRIRA").

> does not apply to any alien who has "entered the United States without inspection," or even to any alien who has been unlawfully present in the United States for more than 1 year. Instead, it applies only to that subset of such aliens who are recidivists, that is, those who have departed the United States after accruing an aggregate period of "unlawful presence" of more than 1 year and who thereafter entered or attempted to reenter . . .

Id. Therefore, unlike § 1182(a)(6)(A)(i), giving effect to § 1182(a)(9)(C)(i)(I) would not render § 1255(i) superfluous. Clearly, then, the BIA's ruling in *Briones* is not inconsistent with its understanding of the interplay between § 1255(i) and § 1182(a)(6)(A)(i).

Second, Mr. Garfias contends that the BIA in *Briones* erred in concluding that recidivist immigration violators inadmissible under § 1182(a)(9)(C)(i)(I) are ineligible for adjustment of status under § 1255(i) because otherwise § 1255(i) would "be making . . . adjustment available to a whole *new class* of aliens who had never been eligible for it." *Briones*, 24 I&N Dec. at 365–67 (emphasis added); *see* Reh. Pet. at 16. Mr. Garfias claims that the statement is erroneous because, when § 1255(i) was first enacted in 1994, there was no ground of exclusion (now inadmissibility) for recidivist immigration violators, like Mr. Garfias, who entered the country without inspection, stayed for at least a year, departed the country, and then entered or attempted to reenter the United States without inspection. Reh. Pet. at 16.

There was, however, a ground of exclusion (now inadmissibility) for recidivist immigration violators who entered the country without inspection, were deported, and then entered or attempted to reenter the United States without inspection. *See* 8 U.S.C. § 1182(a)(6)(A), (B) (1994) (now § 1182(a)(9)(C)(i)(II)). The BIA in *Briones* reasonably saw no reason to distinguish between an alien inadmissible under § 1182(a)(9)(C)(i)(I) and an alien inadmissible under § 1182(a)(9)(C)(i)(II) when considering eligibility for adjustment of status under § 1255(i) because Congress did not see fit to distinguish between these two groups of recidivists for purposes of inadmissibility, and because many of the recidivists inadmissible under current § 1182(a)(9)(C) would have been excludable under former § 1182(a)(6)(B) and thus ineligible for relief under § 1255(i). *Briones*, 24 I&N Dec. at 366-67. Accordingly, if the BIA were to hold that aliens inadmissible under § 1182(a)(9)(C)(i)(I) are eligible for adjustment of status under § 1255(i), it would in effect be making § 1255(i) adjustment available to recidivists, "a whole new class of aliens who had never been eligible for it." *Id*. The BIA reasonably "decline[d] to take such an unwarranted leap." *Id.* at 367.

Finally, Mr. Garfias contends that the BIA in *Briones* erred in deeming "it of crucial importance" that, whenever Congress has chosen to extend eligibility for adjustment of status to inadmissible aliens, Congress has done so "unambiguously,

either by negating certain grounds of inadmissibility outright or by providing for discretionary waivers of inadmissibility, or both." *Briones*, 24 I&N Dec. at 367 (*citing* 8 U.S.C. §§ 1159(c), 1160(a)(1)(C), (c)(2)(A), 1255(h)(2)(A), 1255a(b)(1)(C)(i), (d)(2)(A) (2000)). Notwithstanding the specific references the BIA provided in clear support of its statement, Mr. Garfias claims that the statement is erroneous since Congress apparently enacted 8 U.S.C. § 1255(j) and § 1255(m) to extend eligibility for adjustment of status to aliens who respectively were admitted under § 1101(a)(15)(S)(i) or § 1101(a)(15)(U) "without regard to the specific grounds of inadmissibility, *and* without explicit reference to the need for a waiver or exception (other than the national security grounds at § 1182(a)(3)(E))." Reh. Pet. at 15-16. Mr. Garfias misunderstands the BIA's reference.

The BIA understood that, because adjustment of status is generally unavailable to inadmissible aliens, *see* 8 U.S.C. § 1255(a)(2), (i)(2), whenever Congress has chosen to extend eligibility for adjustment of status *to inadmissible aliens*, Congress has done so "unambiguously, either by negating certain grounds of inadmissibility outright or by providing for discretionary waivers of inadmissibility, or both." *Briones*, 24 I&N Dec. at 367 (citations omitted). In contrast to § 1255(a)(2), (i)(2), adjustment of status under § 1255(j) and §1255(m) is generally *not* unavailable to inadmissible aliens. Indeed, Congress simply negated a waiver of the inadmissibility

provision at § 1182(a)(3)(E), and, therefore, unambiguously declined to extend eligibility for adjustment of status under § 1255(j), (m) *only* to those inadmissible aliens. Thus, because adjustment of status under § 1255(j) and §1255(m) is generally *not* unavailable to inadmissible aliens, Congress did not have to negate certain grounds of inadmissibility or provide for discretionary waivers of inadmissibility to extend adjustment of status under § 1255(j) and §1255(m) to inadmissible aliens. Rather, it had to explicitly negate a waiver of inadmissibility to prevent inadmissible aliens from qualifying for adjustment of status under § 1255(j), (m). Hence, the BIA's analysis in *Briones* was neither erroneous nor unreasonable. Thus, the Court did not misapprehend or overlook any point of law or fact in approving the BIA's reasonable and binding clarification in *Briones*.

II. The Court Did Not Misapprehend or Overlook Any Point of Law or Fact in Applying *Morales-Izquierdo*'s Retroactivity Analysis to Its Interpretation of the INA Based on *Brand X* and *Chevron* Deference.

Mr. Garfias contends that the Court failed to apply the retroactivity analysis set forth in *Montgomery Ward & Co., Inc. v. FTC*, 691 F.2d 1322 (9th Cir. 1982),[5/] to

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[5/] In *Montgomery Ward*, the Court held that an agency "may act through adjudication to clarify an uncertain area of the law, so long as the retroactive impact of the clarification is not excessive or unwarranted." 691 F.2d at 1328. Where an agency's adjudicatory action has a retroactive effect, the Court has applied a five-factor test to determine whether application of the new administrative decision would be contrary to legal and equitable principles. *Id.*

determine whether its deference to (and approval of) *Briones*'s interpretation of the INA should be applied prospectively only. Reh. Pet. at 8-12. However, that *Garfias-Rodriguez* is ultimately a judicial interpretation of a federal statute places it on a fundamentally different plane from *Montgomery Ward*. *See Morales-Izquierdo*, 600 F.3d at 1090. Judicial interpretations of existing statutes and regulations are routinely given full retroactive application on the theory that courts do not make new law or change the law but simply state what the statutes and regulations meant before as well as after the court's decision. *See Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994) ("A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.").[6/] Indeed, this Court has held that "[t]he theory of a judicial interpretation of a statute is that the interpretation gives the meaning of the statute from its inception, and does not merely give an interpretation to be used from the date of the decision." *United States v. City of Tacoma, Washington*, 332 F.3d 574, 580-81 (9th Cir. 2003) (*citing Rivers*, 511 U.S. at 298); *see also Aguilar Gomez v. Mukasey*, 534 F.3d 1204, 1208 n.2 (9th Cir. 2008) (*citing City of Tacoma* and stating that a

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[6/] *But see United States v. Estate of Donnelly*, 397 U.S. 286, 295 (1970) (holding that "decisions construing federal statutes might be denied full retroactive effect" in "rare cases," and suggesting in *dicta* only one example, that is, when the Supreme Court overruled "its own construction of a statute . . . .").

Ninth Circuit decision issued after the decision of the immigration judge under review was nevertheless controlling "because it establishes the proper interpretation of the statute since the statute's inception.").

Here, *Garfias-Rodriguez applied* a statutory interpretation to the parties before it by approving based on *Chevron* and *Brand X* deference *Briones*'s "binding clarification of [the interplay between] §§ 1182(a)(9)(C)(i)(I) and 1255(i)." *Garfias-Rodriguez*, 2011 WL 1346960, at *7. Thus, *Garfias-Rodriguez* did not make new law or change the law, but rather it "correct[ed][7/] [the Court's] prior reading of the statutes in *Acosta* based on the BIA's authoritative ruling in *Briones*." *Id.* (*citing Rivers*, 511 U.S. at 312-13). Mr. Garfias, however, argues that *Rivers* and *Harper v. Va. Dep't of Taxation*, 509 U.S. 86 (1993),[8/] cannot be read to address cases "where a federal court has found a statute to be ambiguous and then deferred to an agency's contrary interpretation, and, is so doing, overturned its prior precedent decision." Reh. Pet. at 6. *Morales-Izquierdo* foreclosed Mr. Garfias's argument.

[7/] Although *Acosta*'s interpretation was not erroneous, *see* Reh. Pet. at 5, it was effectively superceded, pursuant to *Brand X*, by *Briones*'s binding interpretation, and, thus, it was properly corrected by the Court in *Garfias-Rodriguez*.

[8/] In *Harper*, the Court held that, when it "applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." 509 U.S. at 97.

Morales-Izquierdo reiterated that under *Chevron* "courts remain 'the final authority on issues of statutory construction.'" *Morales-Izquierdo*, 600 F.3d at 1089 (*quoting Chevron*, 467 U.S. at 843 n.9). Thus,"[w]hatever the adjudicative history preceding [*Garfias-Rodriguez*], and whatever the tools used in [*Garfias-Rodriguez*] to interpret the statute, a statute can have only one meaning, and [*Garfias-Rodriguez*] tells us what that meaning is." *Morales-Izquierdo*, 600 F.3d at 1089. In other words, "a subsequent judicial interpretation of the same statute based on *Brand X* deference is no less precedential simply because it relied on agency expertise that was not available to the earlier judicial panel." *Id.* at 1090. Accordingly, under *Morales-Izquierdo*, the Supreme Court's preferred approach of full retroactivity as set forth in *Rivers* applies to *Garfias-Rodriguez*'s approval of (and deference to) the BIA's statutory interpretation in *Briones* because *Garfias-Rodriguez* is ultimately a judicial interpretation of a federal statute. As such, Mr. Garfias's retroactivity argument under *Montgomery Ward* must be rejected because it has been foreclosed by *Morales-Izquierdo*, and his request for panel rehearing on this basis should be denied.

In his Fed. R. App. P. 28(j) letter, Mr. Garfias effectively abandoned his retroactivity argument under *Montgomery Ward* and now claims that this Court's *en banc* decision in *Nunez-Reyes v. Holder*, ___ F.3d ___, 2011 WL 2714159 (9th Cir.

July 14, 2011) (*en banc*), provides intervening authority superceding *Morales-Izquierdo* and settling the question of which retroactivity test applies to this petition: the three-factor pure prospectivity test announced in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971), for civil judicial decisions (as opposed to agency adjudications) setting forth a new rule of law. Except as outlined in *Chevron Oil*, the Court's decisions apply retroactively to all civil cases pending before it. *Nunez-Reyes*, 2011 WL 2714159, at *4. For the reasons discussed in Respondent's court-ordered letter brief on this issue, *Chevron Oil* does not support applying *Briones* only prospectively. In short, that *Garfias-Rodriguez* is not a judicial decision that created a new rule of law, but rather a judicial interpretation based on *Chevron* and *Brand X* deference, places it on a fundamentally different plane from *Nunez-Reyes* and *Chevron Oil*. *See* Respondent's Letter Brief at 3-5. Accordingly, the Court's retroactivity analysis in this case is governed by *Morales-Izquierdo*, *City of Tacoma*, and *Rivers*. As such, the Court did not misapprehend or overlook any point of law or fact in applying *Morales-Izquierdo*'s retroactivity analysis to its interpretation of the INA based on *Brand X* and *Chevron* deference.

III. There Is No Basis for *En Banc* Review.

Rehearing *en banc* is not warranted because the Court's opinion does not conflict with any of this Court's precedents or those of the Supreme Court. On the

contrary, the Court's opinion is entirely consistent with *Duran-Gonzales*, *Brand X*, *Chevron*, *Rivers*, *Tacoma Park*, and *Morales-Izquierdo*. Moreover, for the reasons discussed in Respondent's court-ordered letter brief, *Chevron Oil* does not support applying *Briones* only prospectively.

Rehearing *en banc* also is not warranted because Mr. Garfias has failed to establish that he raises a question of exceptional importance. He claims that the Court must clarify under what circumstances an alien may rely on the Court's interpretation of an ambiguous immigration statute. Reh. Pet. at 2. This Court, however, has clarified that, under *Brand X*, an agency may not "resurrect a statutory interpretation that a circuit court has foreclosed by rejecting it as unreasonable at *Chevron*'s second step." *Mercado-Zazueta v. Holder*, 580 F.3d 1102, 1114 (9th Cir. 2009).[9/] Accordingly, there is no basis for *en banc* review. *See* Fed. R. App. P. 35(b)(1).

[9/] *Mercado-Zazueta* also noted that because *Perez-Gonzalez* had "clearly relied" on the agency regulations to reconcile the inadmissibility provision with the special adjustment provision, *Perez-Gonzalez* did not foreclose the BIA's subsequent interpretation of the statutory scheme. *Id.* Thus, under *Mercado-Zazueta*'s reasoning, *Acosta* could not have foreclosed *Briones*'s binding clarification of the interplay between §§ 1182(a)(9)(C)(i)(I) and 1255(i) because *Perez-Gonzalez*'s reasoning controlled the issue in *Acosta*. *See Acosta*, 439 F.3d at 554.

CONCLUSION

For the foregoing reasons, the petition for panel rehearing and rehearing *en banc* should be denied.

Respectfully submitted,

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Dated: September 8, 2011

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that pursuant to Ninth Cir. R. 40-1, the foregoing "Respondent's Opposition to the Petition for Rehearing and Rehearing *En Banc*" is proportionately spaced, has a typeface of 14 points or more and contains 3,772 words (must not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text).

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Re: Garfias-Rodriguez v. Holder, No. 09-72603
Supplemental Letter Brief

Dear Ms. Dwyer:

Pursuant to the Court's order dated July 29, 2011, Petitioner submits the following letter brief addressing the effect of the Court's *en banc* decision in *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. July 14, 2011), on whether the Court's decision in *Garfias-Rodriguez*, -- F.3d --, 2011 WL 1346960 (9th Cir. 2011), should be applied retroactively.

In *Garfias-Rodriguez*, the Court deferred to and adopted the rule announced in the Board of Immigration Appeals (BIA) precedent opinion, *Matter of Briones*, 24 I. & N. Dec. 355 (BIA 2007), and in doing so, overturned prior Circuit precedent set forth in *Acosta v. Gonzales,* 439 F.3d 550 (9th Cir. 2006). The Court reasoned that "the BIA remains 'the authoritative interpreter (within the limits of reason)'" and thus deferred to the subsequent agency interpretation of an ambiguous statute even though it contradicted the Court's previous interpretation of the statute set forth in *Acosta*. *Garfias-Rodriguez*, 2011 WL 1346960 at *6. The Court, relying on *Morales-Izquierdo v. Department of Homeland Security*, 600 F.3d 1076 (9th Cir. 2010), then determined that this interpretation must be applied retroactively. *Garfias-Rodriguez*, 2011 WL 1346960 at *6-7.

Morales-Izquierdo determined that regardless of whether the Court is obligated to adopt a contrary agency interpretation of an ambiguous statute, its decision constitutes a judicial interpretation and the case law governing retroactivity of judicial decisions applies. *Morales-Izquierdo*, 600 F.3d at 1090. Notably, the Court cited to *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312 (1994), to conclude that that the new rule announced in its decision must be applied retroactively. *Morales-Izquierdo*, 600 F.3d at 1090. Petitioner maintains, as he did in his rehearing petition, that the Court's reliance on *Rivers* was erroneous and that the court should have engaged in a multi-factor retroactivity analysis.

Significantly, the retroactivity analysis in *Morales-Izquierdo*, has since been superseded by this Court's *en banc* opinion in *Nunez-Reyes*. Thus, this Court is not bound by that panel's conclusions or analysis. *See Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1019 (9th Cir. 2006) (holding that where the reasoning of a prior authority is irreconcilable with the reasoning of an intervening higher authority, the panel is bound by intervening higher authority). In *Nunez-Reyes*, the Court overturned its prior precedent *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), regarding whether an expunged conviction still renders someone removable. *Nunez-Reyes*, 646 F.3d at 687. Nonetheless, the Court recognized that vast numbers of noncitizens had relied on established case law and thus considered whether the new rule should apply retroactively to them. *Id.* at 691-93. Although the "default principle" is that a court's decision applies retroactively to all cases pending before the courts, the Court departs from that "default principle" when the new judicial decision meets the criteria set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). *Id.* at 690. The Court held that it is obliged to apply the *Chevron Oil* test whenever there is a new rule of law announced in a civil case that does not concern the Court's jurisdiction. *Id.* at 691.[1]

Nunez-Reyes makes clear that the Court must apply the *Chevron Oil* retroactivity analysis to judicial interpretations.[2] This test requires weighing three factors: "(1) whether the decision 'establish[es] a new principle of law'; (2) 'whether retrospective operation will further or retard [the rule's] operation' in light of its history, purpose, and effect; and (3) whether our decision 'could produce substantial inequitable results if applied retroactively.'" *Id.* at 692.

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[1] *Nunez-Reyes* placed no other qualifications on applying the *Chevron Oil* test. It does not limiting its holding to only constitutional, as opposed to statute-based, decisions. *See, e.g., Crowe v. Bolduc*, 365 F.3d 86, 92 (1st Cir. 2004) (judicial change to interpretation of federal rule applies prospectively only under *Chevron Oil)*; *Shah v. Pan Am. World Services, Inc.*, 148 F.3d 84, 92 (2d Cir. 1998) (judicial change to interpretation of venue transfer statute at 28 U.S.C. § 1404(a) applies prospectively only under *Chevron Oil*).

[2] As the Court was obligated to adopt the agency's contrary interpretation pursuant to *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), Petitioner previously asserted that the retroactivity test presented in *Montgomery Ward & Co., Inc. v. FTC,* 691 F.2d 1322 (9th Cir. 1982), is most applicable to the current situation. However, Petitioner submits that application of either the *Chevron Oil* test or the *Montgomery Ward* test would lead to a determination that the new rule adopted by this Court should only be applied prospectively.

Application of the three factors demonstrates that the holding in *Garfias-Rodriguez* should not be given retroactive effect. First, the rule adopted in *Garfias-Rodriguez* established a new principle of law by overruling the Court's earlier precedential decision in *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006). *Accord Nunez-Reyes*, 646 F.3d at 692 ("There is no question that our decision today 'establish[es] a new principle of law . . . by overruling clear past precedent on which litigants may have relied.'") (internal citation omitted).[3]

Indeed, when the BIA, in *Matter of Briones*, first clarified its interpretation of the ambiguous statute, it explicitly declined to decide what interpretation should be applied in the Ninth Circuit. *Briones*, 24 I. & N. Dec. at 372, n.9. This was because it recognized that *Acosta* had established a different rule in the Ninth Circuit. It is noteworthy that it was not until *after* the BIA issued its final order in this case that it issued a published opinion in *Matter of Diaz and Lopez*, 25 I. & N. Dec. 188 (BIA 2010), announcing that it would apply the agency's interpretation, not the interpretation of this Court, to cases arising in the Ninth Circuit. Thus, this clearly was not "an issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil*, 404 U.S. at 106.

Second, retroactive application of *Garfias-Rodriguez* will not advance the new holding. In assessing this factor, the *Nunez-Reyes* Court looked to the new rule's "history, purpose, and effect." *Nunez-Reyes*, 646 F.3d at 694. The court ultimately concluded that, "Nothing in the statute or its history, purpose, or effect suggests that Congress intended adverse immigration consequences for those

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[3] In *Garfias-Rodriguez* the Court explicitly stated that "we are not creating a new rule of law, but rather we are correcting our prior reading of the statutes in *Acosta* based on the BIA's authoritative ruling in *Briones*." *Garfias-Rodriguez*, 2011 WL 1346960 at *7. In so holding it cited to *Rivers,* 511 U.S. at 312–13) ("A judicial construction of a statute is an authoritative statement of what the statute meant *before* as well as after the decision of the case giving rise to that construction." (emphasis added))." Nonetheless, under *Nunez-Reyes* and the first factor of the *Chevron Oil* test, *Garfias-Rodriguez* "establish[ed] a new principle of law." *Nunez-Reyes*, 646 F.3d at 692. *Garfias-Rodriguez*, like *Nunez-Reyes*, overturned a judicial decision, correcting its prior interpretation of a statute. The emphasis by the Court in *Garfias-Rodriguez* with regard to statutory interpretations and "new rules of law" does not track the first factor of the *Chevron Oil* test.

whose [actions taken in reliance of prior precedent] turned out to be so ill-informed." *Id.*

Here, the Court has concluded that Congress' intent was ambiguous with regard to the interplay between "two competing mandates." *Garfias-Rodriguez*, 2011 WL 1346960 at *5. Thus, there was no clear indication that Congress intended such adverse consequences for Petitioner's "ill-informed" actions. *See Nunez-Reyes*, 646 F.3d at 694. In relying on *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), and overturning *Acosta*, the holding did not ascertain clear congressional intent, but instead found that the agency had the authority to render its own interpretation of an ambiguous statute. *Garfias-Rodriguez* advances the principal that the agency has the authority to apply its own interpretation of an ambiguous statute. This principal is not undermined by applying the interpretation prospectively only.

Moreover, the history, purpose and effect of the applicable adjustment of status statute at issue here, 8 U.S.C. § 1255(i), similarly demonstrates that Congress's goal was family unification, which, in fact, is furthered by applying the new rule prospectively only. 8 U.S.C. § 1255(i) created an "exception" to the "general rule" that "aliens who entered the country without inspection are ineligible to seek adjustment to lawful permanent status." *Chan v. Reno*, 113 F.3d 1068, 1071 (9th Cir. 1997). Section 1255(i) had previously expired, but under the Legal Immigration and Family Equity (LIFE) Act, Congress provided a one-time extension of the sun-setting provision, for the specific purpose of allowing U.S. citizen and lawful permanent resident family members to remain together with their loved ones, despite immigration violations that the undocumented relative may have committed. Pub. L. No. 106-554, 114 Stat. 2763, 2763A-324 (2000). The *Acosta* Court recognized that the legislative history demonstrated congressional intent to keep families together, even where the applicants would otherwise be inadmissible for prior immigration violations and unlawful re-entry. *Acosta*, 439 F.3d at 554. The Court must consider the Act as a whole in determining Congressional intent. *Cf. Nadarajah v. Gonzales*, 569 F.3d 906 (9th Cir. 2006) ("In addition, '[i]n ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.' *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291(1988) (citations omitted)").

Finally, as in *Nunez-Reyes*, it would be fundamentally unfair to apply the decision retroactively to Petitioner. *See Nunez-Reyes*, 646 F.3d at 693. In assessing this factor, the *Nunez-Reyes* Court examined the clarity of the prior overruled precedent

and actions taken in reliance on that precedent, reasoning that the ability to "make a fully informed decision" is paramount to the analysis. *Id.*

The concerns discussed in *Nunez-Reyes* are equally applicable here. When Mr. Garfias applied for adjustment of status, the holding of *Acosta* was clearly established. Hundreds of other individuals who were in his position had been granted status pursuant to the Court's ruling in *Acosta.* Indeed, the BIA itself had originally granted Petitioner's administrative appeal acknowledging that persons like Petitioner remained eligible under *Acosta*. Thus, he submitted his adjustment application, paying thousands of dollars in filing fees and attorney fees in unequivocal reliance on *Acosta*. Only after doing so did the rule change, forcing him to suffer not only great financial loss, but even more devastating, subjecting him to removal and indefinite separation from his U.S. citizen wife and children.

With regards to the third factor it is also noteworthy that in *Nunez-Reyes,* the Court looked to other tests governing retroactivity in assessing whether it is fundamentally unfair to apply a new judicial decision retroactively. 646 F.3d at 693 (discussing *INS v. St. Cyr*, 533 U.S. 289, 322 (2001), which involved the retroactive application of a new statute, as opposed to a new judicial decision). Similarly, *Chay Ixcot v. Holder*, 646 F.3d 1202 (9th Cir. 2011), offers guidance to the instant analysis. In *Chay Ixcot* the Court found that the change in law should not be applied to persons who applied for asylum before the law took effect, which otherwise would have eliminated their eligibility for relief. *Id.* at *9. *See also Faiz–Mohammad v. Ashcroft,* 395 F.3d 799, 809-10 (7th Cir. 2005) (finding that application of change in law eliminating eligibility for adjustment of status would have impermissible retroactive effect if applied to person who filed adjustment of status application in reliance on prior law); *Sarmiento Cisneros v. Attorney General*, 381 F.3d 1277, 1284 (11th Cir. 2004) (same); *Arevalo v. Ashcroft,* 344 F.3d 1, 5 (1st Cir. 2003) (same).

The *en banc* decision in *Nunez-Reyes* thus confirms that applying the retroactivity test of *Chevron Oil*, the Court should determine that its holding in *Garfias-Rodriguez* applies *prospectively* only.

Respectfully Submitted,

S/ Matt Adams
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Counsel for Petitioner

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39-61-934.02

U.S. Department of Justice
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September 8, 2011

Honorable Molly C. Dwyer, Clerk
United States Court of Appeals for the Ninth Circuit,
The James R. Browning Courthouse, 95 7th Street
San Francisco, CA 94103

Re: No. 09-72603, *Garfias-Rodriguez (A079-766-006) v. Holder*

Dear Ms. Dwyer:

Respondent respectfully submits this letter brief on the effect of the pure prospectivity test announced in *Nunez-Reyes v. Holder*, ___ F.3d ___, 2011 WL 2714159 (9th Cir. July 14, 2011) (*en banc*), on this petition, where the Court applied the Supreme Court's preferred approach of full retroactivity as set forth in *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994)("A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction."). *See Garfias-Rodriguez v. Holder*, ___ F.3d ___, 2011 WL 1346960, *7 (9th Cir. April 11, 2011).

Legal Background

Following *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967 (2005), and *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), *Garfias-Rodriguez* abrogated *Acosta v. Gonzales*, 439 F.3d 550, 556 (9th Cir. 2006), in light of the Board of Immigration Appeals's ("BIA") authoritative holding in *Matter of Briones*, 24 I. & N. Dec. 355 (BIA 2007), that aliens *may not* adjust their status under 8 U.S.C. § 1255(i) if they are inadmissible under § 1182(a)(9)(C)(i)(I) (reentering the country illegally after a year of unlawful presence). *Acosta* relied on the reasoning of *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783, 793-95 (9th Cir. 2004), *Acosta*, 439 F.3d at 554, which was "effectively overruled" by this Court in *Duran Gonzales v. Dep't of Homeland Security*, 508 F.3d 1227, 1236 n.7 (9th Cir. 2007). In *Duran Gonzales*, 508 F.3d at 1241-42, the Court, based on *Brand X* deference, abrogated *Perez-Gonzalez* in light of the BIA's decision

in *Matter of Torres-Garcia*, 23 I. & N. Dec. 866 (BIA 2006), which held that aliens may not adjust their status under 8 U.S.C. § 1255(i) if they are inadmissible under § 1182(a)(9)(C)(i)(II) (reentering the country illegally after a prior removal).

The Court also has ruled that its decisions respectively deferring to the parallel statutory interpretations of *Briones* and *Torres-Garcia* apply retroactively. *Garfias-Rodriguez*, 2011 WL 1346960, at *6-7; *Morales-Izquierdo v. Dep't of Homeland Security*, 600 F.3d 1076, 1088-90 (9th Cir. 2010). In *Morales-Izquierdo*, the Court ruled that "[w]hatever the adjudicative history preceding [*Duran-*]*Gonzales*, and whatever the tools used in [*Duran-*]*Gonzales* to interpret the statute, a statute can only have one meaning, and [*Duran-*]*Gonzales* tells us what that meaning is." 600 F.3d at 1089. In other words, "a subsequent judicial interpretation of the same statute based on *Brand X* deference is no less precedential simply because it relied on agency expertise that was not available to the earlier judicial panel." *Id.* at 1090. Thus, under *Morales-Izquierdo*, the Supreme Court's preferred approach of full retroactivity as set forth in *Rivers* applies to *Garfias-Rodriguez*'s approval of (and deference to) the BIA's statutory interpretation in *Briones* because, like *Duran-Gonzales*, *Garfias-Rodriguez* is ultimately a judicial interpretation of a federal statute.

Mr. Garfias claims that *Nunez-Reyes* provides intervening authority superceding *Morales-Izquierdo* and settling the question of which retroactivity test applies to this petition, to wit: the three-factor pure prospectivity test announced in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971), for civil judicial decisions creating a new rule of law. His claim is without merit.[1/]

That *Garfias-Rodriguez* Is a Judicial Interpretation Based on *Chevron* and *Brand X* Deference Places It on a Fundamentally Different Plane from *Nunez-Reyes* and *Chevron Oil*.

Except as outlined in *Chevron Oil*, the Court's decisions apply retroactively to all cases pending before it. *Nunez-Reyes*, 2011 WL 2714159, at *4. The Court will deviate from the normal rule of full retroactivity: (1) in a civil case; (2) when the Court announces a new rule of law, as distinct from applying a new rule that it or the Supreme Court previously announced; (3) and when the

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[1/] In *Duran-Gonzales*, the Court also has requested supplemental briefing regarding the impact of *Nunez-Reyes* on that case. *See* No. 09-35174, *Duran Gonzales v. Dep't of Homeland Security*.

new rule does not concern its jurisdiction. *Id.* at *5. In *Nunez-Reyes*, however, the Court announced a new rule of constitutional law, not a new statutory interpretation. *Id.* at *3. The Court, reviewing *de novo* and agreeing with the BIA and its sister circuits, held that the constitutional guarantee of equal protection does not require that, for immigration purposes, a state controlled-substance possession offense disposed of under a state deferred-adjudication statute be treated the same as a federal controlled-substance possession offense disposed of under the Federal First Offender Act ("FFOA"), 18 U.S.C. § 3607. *Id.* at *2-3. The Court thus overruled *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), and those cases that, under the rule of *stare decisis*, followed *Lujan-Armendariz*. *Id.* at *1, 3. It is unclear from *Nunez-Reyes* whether the Court will deviate from the normal rule of full retroactivity when it announces a new statutory interpretation. *Rivers*, which postdated *Chevron Oil*, and which rejected an assertion of prospective-only application in the context of statutory construction, suggests that it should not. *Rivers*, 511 U.S. at 313 n.12. But even assuming, without conceding, that *Nunez-Reyes* allows the Court to deviate from the Supreme Court's preferred approach of full retroactivity when it announces a new statutory interpretation, *Nunez-Reyes* made clear that the Court will not deviate from this approach when it applies "a new rule that it or the Supreme Court previously announced." *Id.* at 5. This would be such a situation.

Garfias-Rodriguez involves a judicial interpretation of a federal statute, but it did not announce a new interpretation. "The Supreme Court's opinions in *Chevron* and *Brand X* together hold that, to the extent that [*Acosta*] was grounded in the ambiguous language of the statute, the BIA's reasonable discretionary construction of the statute in [*Briones*] has 'effectively overruled' contrary holdings in [*Acosta*]." *Duran Gonzales*, 508 F.3d at 1236 n.7. Accordingly, rather than creating or announcing a new rule of law, *Garfias-Rodriguez* based on deference to the BIA under *Chevron* and *Brand X* "correct[ed]" the Court's prior reading of the statutes in *Acosta* by "approv[ing]" the BIA's "binding clarification" in *Briones*. 2011 WL 1346960, at *7. In *Nunez-Reyes*, the Court did not correct its prior equal protection holding in *Lujan-Armendariz* by approving, based on *Brand X* deference, the BIA's conflicting interpretation in *Matter of Salazar-Regino*, 23 I. & N. Dec. 223, 235 (BIA 2002) (*en banc*). Instead, the *Nunez-Reyes* court "reconsidered" *Lujan-Armendariz*'s equal protection holding and simply "agree[d]" with the BIA's and six sister circuits' conflicting interpretation. *Nunez-Reyes*, 2011 WL 2714159, at * 3.

It was in this context that the *Nunez-Reyes* court invoked the three-prong pure prospectivity test set out in *Chevron Oil*. *Id.* at 3-5. Accordingly, the Court's retroactivity analysis in this case is governed by *Morales-Izquierdo* and *Rivers*, not *Chevron Oil*.

Even assuming, arguendo, that *Garfias-Rodriguez*'s "correction" of a prior reading of the statute is a situation to which *Chevron Oil*'s pure prospectivity test applies, the Court still should apply its approval of *Briones* retroactively. Under *Chevron Oil*, courts consider three factors in determining whether a decision should only be applied prospectively. The first factor is whether "the decision to be applied nonretroactively ... establish[es] a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil*, 404 U.S. at 106 (citation omitted). As noted in *Garfias-Rodriguez*:

> *Acosta* relied heavily on our reasoning in *Perez-Gonzalez*, which has itself been effectively abrogated by the BIA's decision in *Torres-Garcia*. *See Duran Gonzales*, 508 F.3d at 1242. Because *Acosta* did not "unambiguously foreclose[ ]" the BIA's authority to interpret the interplay between §§ 1182(a)(9)(C)(i)(I) and 1255(i), the BIA remains "the authoritative interpreter (within the limits of reason)" of the immigration laws. *Brand X*, 545 U.S. at 983, 125 S. Ct. 2688.

Garfias-Rodriguez, 2011 WL 1346960, at *5 (alterations in original). In short, because *Acosta* did not unambiguously foreclose *Briones*'s subsequent interpretation of the statutory scheme, and because *Acosta* had been significantly undermined by *Duran Gonzales*, *Garfias-Rodriguez* did not overrule clear past precedent *on which litigants may have objectively relied*, nor did it decide an issue of first impression *whose resolution was not clearly foreshadowed*. To the contrary, *Torres-Garcia* clearly foreshadowed *Briones* and *Duran Gonzalez* clearly foreshadowed *Garfias-Rodriguez*.

The second factor requires the Court to "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Chevron Oil*, 404 U.S. at 106-07. This factor strongly supports retroactive operation. The BIA has observed that the underlying purpose of §

1182(a)(9)(C) "was to single out recidivist immigration violators and make it more difficult for them to be admitted to the United States after having departed." *Briones*, 24 I. & N. Dec. at 358. The BIA has added that § 1182(a)(9) generally "seek[s] to compound the adverse consequences of immigration violations." *Matter of Rodarte-Roman*, 23 I. & N. Dec. 905, 909 (BIA. 2006). By applying *Briones* only prospectively, however, the Court would delay Congress's underlying policy goals of making admission more difficult for immigration recidivists. Thus, the delay that would be caused by this prospective application would "retard" the operation of *Briones*. *See Chevron Oil*, 404 U.S. at 107.

The third factor instructs the Court to inquire whether its decision "could produce substantial inequitable results if applied retroactively." *Chevron Oil*, 404 U.S. at 107 (internal quotation marks omitted). In *Nunez-Reyes*, the Court found that applying its decision retroactively would create substantial inequitable results to aliens who had waived their constitutional right to trial in reliance on *Lujan-Armendariz*'s promise of no immigration consequences. 2011 WL 2714159, at *6-7. No considerations of this sort are present in this case. Mr. Garfias and amicus have suggested that full retroactivity will create substantial inequitable results because aliens paid filing fees and risk removal proceedings and separation from their families by coming "out of the shadows" to seek adjustment of status based on *Acosta*. Amicus's Brief at 10-11; Rehearing Petition at 14. Nevertheless, Mr. Garfias and similarly situated aliens did not waive any rights or give up any legitimate liberty or property interest by coming "out of the shadows" to apply for a wholly discretionary benefit. Or, to put it differently, *Chevron Oil* does not support applying this Court's approval of *Briones* only prospectively to an alien who reentered the country illegally after a year of unlawful presence in reliance on *Acosta*'s statutory interpretation.

For the foregoing reasons, the Court should give full retroactivity to its approval of *Briones*'s binding interpretation.

Sincerely,
\s\ Luis E. Perez
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